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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1613

NALCO CHEMICAL COMPANY,

Petitioner,

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Nalco Chemical Company, prays that a Writ of Certiorari issue to review the opinions and judgment of the United States Court of Appeals for the District of Columbia entered in this case, *en banc*, on March 19, 1976.

OPINIONS BELOW.

The opinions and judgment of the Court of Appeals are reported at 8 ERC 1785. Because of their extraordinary length, they are filed in a separate, bound Appendix with this Court.*

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* The majority and dissenting *en banc* opinions below are referred to hereinafter as "Maj. Op. ....." and "Dis. Op. .....". "App. ....." refers to the Joint Appendix filed in the court below on July 15, 1974. "Doc. ....." refers to the number assigned to documents listed in the certified index to the record filed on January 29, 1974 and supplemented by respondent on March 28, 1974 and April 19, 1974.

Emphasis is supplied herein unless otherwise noted.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 19, 1976. Issuance of the mandate has been stayed, pending the filing of a petition for a Writ of Certiorari, by order of the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Administrator of the Environmental Protection Agency has inherent discretion to limit the use of lead additives in gasoline on the basis of fear of an uncertain or unknown harm, notwithstanding that the Clean Air Act authorized the Administrator to regulate only if the emission products of such fuel additive "will endanger the public health or welfare".

2. Whether judicial review of environmental regulations, which involve highly technical areas, should be limited, and if so, what is the correct standard of procedural and substantive review of such regulations.

3. Whether the adoption of the final lead additive phase-down regulations by the Administrator of the Environmental Protection Agency was in violation of the Administrative Procedure Act and a clear error of judgment.

4. Whether the Environmental Protection Agency met the requirements of the Administrative Procedure Act when it did not provide adequate notice and opportunity to comment to the public and interested persons on new medical and scientific evidence which was substituted for prior evidence and became the basis for its final regulations.

5. Whether the reviewing court may properly go outside the administrative record and initiate after oral argument, an *ex parte* investigation for the purpose of supplementing that record to determine when the public and interested persons received notice of material upon which the regulations were based.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the Clean Air Act (42 U. S. C. §§ 1857c-3, 1857f-1 and 1857f-6c), the Administrative Procedure Act (5 U. S. C. §§ 553 and 706) and the regulations involved (40 CFR § 80.1, 80.2(c), 80.20, 80.25 and 80.26) are set forth in Appendix A, hereto.

STATEMENT OF THE CASE.

Chronology of the Regulations.

On January 30, 1971, within one month after the enactment of the Clean Air Act Amendments, the Administrator of the Environmental Protection Agency (EPA) issued an advance notice of proposed rulemaking to reduce the permissible lead content of gasoline under Section 211(c)(1)(A) of the Act (36 Fed. Reg. 1486). More than one year later, on February 23, 1972, the EPA published its first set of proposed regulations (App. 23). This first set of regulations proposed a reduction in the use of lead additives in gasoline over a four-year period beginning January 1, 1974, based on EPA's conclusion that:

> "Airborne lead levels exceeding 2 μg per cubic meter . . . are associated with a sufficient risk of adverse physiological effects to constitute endangerment of the public health." (App. 23.)

This proposed rulemaking was accompanied by the EPA's first health justification document, "Health Hazards of Lead" (App. 292) and a subsequent position paper, "Atmospheric Lead and Public Health", to bolster its conclusion as to the alleged need for a 60-65% reduction in airborne lead (App. 276). Comments were invited for a 90-day period (37 Fed. Reg. 11786-87). Within two months, EPA made corrections and additions to the "Health Hazards of Lead" paper because of "miscalculations" (App. 272).

Hearings were held on these regulations and numerous comments and statements were submitted from the industrial, medical, scientific and governmental communities which severely criticized EPA's medical and scientific justification for these regulations (See, *e.g.*, App. 2118, 2413, 2431, 2438, and 2481).

EPA then reevaluated its health justification, "changed it substantially" (App. 2), and reproposed regulations on January 10, 1973 (App. 14).* The reproposed health regulations were accompanied by another EPA health justification paper, entitled "EPA's Position on the Health Effects of Airborne Lead" (App. 158). As the majority opinion notes, EPA had completely "abandoned" its earlier "discredited" approach for estimating the reduction in airborne lead necessary to protect public health, by the time that the Second Health Document was issued (Maj. Op. A-3).

The comment period for this second set of proposed regulations closed on March 11, 1973. Despite the substantial changes in EPA's position, criticism from the scientific and medical communities as well as other governmental agencies continued unabated (See, *e.g.*, App. 2477, 2479 and 2494).

On October 28, 1973, while EPA was considering the comments on the second proposed regulations, the Court of Appeals for the District of Columbia Circuit issued a single-page order directing the EPA Administrator to reach a final decision on the matter within 30 days.**

On November 28, 1973, the final regulations were announced and were promulgated on December 6, 1973 (App. 1). The final

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* At the same time, the EPA issued final regulations requiring the marketing of lead-free gasoline. These regulations ("the marketing regulations") were approved in *Amoco Oil Co.* v. *EPA*, 501 F. 2d 722 (D. C. Cir. 1974).

** *National Resources Defense Council* v. *EPA*, No. 72-2233 (D. C. Cir., Oct. 28, 1973). Petitioner herein was not a party to this case. The order was entered on the motion of the plaintiff and was unreported.

regulations were accompanied by still another health justification document, this time entitled "Health Implications of Airborne Lead" (App. 27). The regulations, as promulgated in the *Federal Register*, are accompanied by a lengthy Preamble which summarizes EPA support for its health position (App. 1-5). No comment period was allowed on the final regulations.

Petitioner filed its petition to review these regulations on December 27, 1973, pursuant to Section 307 of the Clean Air Act (42 U. S. C. § 1857h-5). On December 20, 1974, the panel of the Court of Appeals which heard the petition, ordered the regulations set aside in an 87-page opinion (with a 96-page dissent) published on January 28, 1975 (7 ERC 1353). "Because of the importance of the issues presented," the Court of Appeals for the District of Columbia granted EPA's petition for rehearing, set the case for argument *en banc* on May 30, 1975 and reversed the panel opinion in a 5 to 4 decision published on March 19, 1976, with two concurring and two dissenting opinions.

Background Facts

At the outset, it is important to recognize that lead occurs naturally in the earth's crust and atmosphere (App. 319) and is a part of every living thing (App. 54). Lead is not harmful *per se* (App. 2611) and in fact, it is now thought that lead may be a necessary element for growth (Doc. 459).

Mere exposure to lead is not indicative of harm to health. The absorption of lead without retention is not indicative of harm, since it is undisputed that lead is continuously excreted by the body, by means of known biological mechanisms and is stored in bone, teeth and hair where it is biologically inert and thus without harmful health effects (App. 324-25). In normal circumstances, human beings achieve a steady state of lead body levels and maintain this steady state with the rate of output approximately equal to the rate of input (App. 326).

Dr. Paul B. Hammond, Chairman of the Panel on Lead of the National Academy of Sciences summarized this background:

> "It is not a question of whether or not people have lead. They all do. It is rather a question of how much lead they have and how much is harmful. So far as adults are concerned, the general population is exposed to far less lead than are workers in battery factories and lead smelters who remain in good health in spite of their high exposure as compared to the general public." (App. 2611.)

The principal source of lead to human beings, by far, is the food and fluids of the normal diet—not the respiration of airborne lead (App. 1970, 1996-97). Even though there has been a rise in the use of leaded gasoline—a 70% increase from 1959-1969 (App. 2427)—there has not been a corresponding rise in the average concentrations of airborne lead in major urban areas, as shown by the conclusion of the National Academy of Science that with:

> ". . . the high degree of dispersion associated with the venting of burned lead alkyls into the air . . . the *average lead content of the air over most major cities apparently has not changed greatly over the last 15 years.* The net result is that correspondingly little change in the character and magnitude of the effects of atmospheric lead on biologic systems will likely occur for some years to come. *We are, in short, not dealing with a rapidly shifting scene in this respect.*" (App. 356-57.)

Lead compounds have been used as additives in gasoline for over 50 years, for the purpose of increasing the octane or "antiknock" quality required by high compression engines. Increasing the compression ratio in automobile engines adds to efficiency and economy of operation, but the gasoline octane must be increased accordingly. If lead cannot be used, then additional "aromatics", derived from crude oil itself, must be substituted. The production of additional aromatics requires more severe refining conditions and the use of substantial additional quantities of crude oil (App. 1414-15). Thus, these regulations will

inevitably result in the consumption of large quantities of additional barrels of crude oil each year as well as imposing substantial financial requirements on refiners for construction of new facilities and modifications of those now in existence.

REASONS FOR GRANTING THE WRIT.

I. The Lower Court Unjustifiably Attributed Inherent Discretion in the EPA to Regulate, Despite a Limited Congressional Grant of Authority.

The majority opinion below concludes that in the area of the environment and public health, EPA has inherent discretion to regulate, with standards of agency rationality similar to the standards used to review Congressional legislation. This inherent discretion, according to the majority opinion, comes necessarily into play because the regulation deals with the environment, despite the specific language of the Congressional grant of authority and despite the absence of a scientific or medical "data base" for regulation. The opinion of the lower court will be undoubtedly quoted for this proposition as long as it stands unreviewed. However, if this is to be the law of environmental regulation, it should be decided by this Court and not by the lower court in a 5 to 4 decision.

The opening paragraph of the majority opinion presages its holding that even in the absence of medical or scientific evidence, the EPA may regulate:

> "It is only recently that we have begun to appreciate the danger posed by unregulated modification of the world around us, and have created watchdog agencies whose task it is to warn us, and protect us, when technological 'advances' present dangers unappreciated—or unrevealed—by their supporters. . . . Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and, sometimes, with little or no evidence at all." (Maj. Op. 6.)

The majority opinion after extensive discussion, repeats the theme—EPA has inherent discretion to regulate:

> "Questions involving the environment are particularly prone to uncertainty. . . . How else can they act, given a mandate to protect the public health but only a *slight or non-existent data base* upon which to draw?" (Maj. Op. 46-47.)

To be sure, the majority opinion argued that they were not allowing the EPA Administrator "to set policy on his own terms" and that Congress did set policy guidelines (Maj. Op. 55). But those guidelines are so broad that it matters very little whether Congress attempted to specifically limit or condition the EPA's power. Once the majority assumed that the issue of the health effects of lead was "on the frontiers of scientific knowledge", the EPA could act based on no more than a "fear of an unknown harm" (Maj. Op. 56).

The dissent was well aware that the majority was enunciating a different and lower standard for environmental regulation:

> "From the pages of the court's opinion there seeps the theme that this is an environmental case; hence, the court like the agency need not labor by the usual rules. We recognize no such exemption for this or any other type case . . ." (Dis. Op. 50.)*

A. Threshold Determination.

In Section 211(c)(1)(A) of the Clean Air Act, Congress authorized EPA to regulate gasoline additives only "if any emission products of such fuel or fuel additive will endanger the public health." But the majority argues that instead of calling for "the Administrator to make a threshold factual determination of endangerment":

> "[A] determination of endangerment to public health is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." (Maj. Op. 46.)

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* See also Dis. Op. 35.

However, as the dissent points out, the "question" of whether the EPA may "assess risks" in regulating fuel additives is a strawman (Dis. Op. 52). The issue is whether Congress required the EPA to decide, based upon its expertise, that there is a causal connection between lead additive emissions and an endangerment to public health. As even the majority admits, Congress set up "a legal mechanism by which the [medical] evidence could be weighed in a more *objective* tribunal" (Maj. Op. 12).*

The only prior decision dealing with this section of the Clean Air Act (*Amoco Oil Co.* v. *EPA*, 501 F. 2d 722 (D. C. Cir. 1974)) dealt with Section 211(c)(1)(B) giving the EPA Administrator authority to regulate fuel additives on other than a health endangerment basis, *"if emission products* of such fuel or fuel additive *will impair to a significant degree"* the performance of emissions control devices. The court held there that this section requires a:

> ". . . threshold determination whether or not to regulate a particular fuel or additive. In effect, the provision establishes a rebuttable *presumption* that the Agency should maintain a *laissez faire* posture with regard to fuel regulation. . . . The findings are to show why regulation, as opposed to no regulation, is necessary or otherwise advisable. These findings constitute a *condition precedent* to embarking upon the exercise of regulatory power." (501 F. 2d at 736.)

The court went on to find that EPA had quasi-legislative powers in deciding *how* to regulate.

However, in dealing with the companion provision giving the Administrator power to regulate fuel additives *"if any emissions products* or such fuel or fuel additive *will endanger* the public health or welfare," the majority argues that this section is "inherently" different. Unlike subsection (B), which is "highly

* In fact, Congress clearly believed that EPA should embark upon a course of regulation "only with trepidation", as the majority notes, because such regulation would be "telling manufacturers how to make their fuels." (Maj. Op. 16, n. 14.)

suitable to factual proof." the "Section 211(c)(1)(A) threshold determination . . . is inherently unlike that of its sister section" and the question of endangerment "is a risk, and so must be decided by assessment of risks as well as by proof of facts." (Maj. Op. 45.) Thus, the majority opinion, in attempting to distinguish its interpretation in *Amoco*, falls back on unjustified assumptions of "inherent" differences.*

The majority also concedes that *Amoco* held that Section 4 of the Administrative Procedure Act (5 U. S. C. § 553) necessarily calls for a "factual threshold determination" in connection with subsection (B) ("if . . . will impair") (Maj. Op. 45-46). Why does not the parallel subsection (A) ("if . . . will endanger") call for such a threshold determination?

B. Legislative History.

The majority attempted to find support in the legislative history, but all that exists points to the opposite conclusion. The majority argues that an early House bill called for a "specific findings" under the 'will endanger' standard (Maj. Op. 38), and that the deletion of that findings requirement was:

> "a recognition by Congress that a determination of endangerment to public health is *necessarily* a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." (Maj. Op. 46.)

This assertion is unsound. If the statute as first written called for "specific findings," the "will endanger" standard could not "necessarily' be a question of policy. How could it inherently become so, if the "specific findings" requirement were removed? The fact is that the House bill never did call for "specific find-

* The only apparent ground for such an argument, is that a determination of "impairment" is less complex scientifically than a determination of "endangerment". The absence of legislative history to support such a reading of parallel sections, makes it merely an opinion based on the clarity of hindsight.

ings" in connection with endangerment.* The legislative history shows that both the House and Senate intended that if fuel additives were to be regulated either because of impairment to an emission control device *or* endangerment of the public health, a factually based determination must be the basis.**

C. Comparison with Other Sections.

The majority opinion engages in a lengthy comparison of Section 211(c)(1)(A) with Sections 108 and 202 of the Clean Air Act, in order to bolster its construction of Section 211 (Maj. Op. 22-28). This comparison results in interpretations of these sections which makes determination of EPA's powers under the Clean Air Act ambiguous at best.

The majority opinion argues that Section 108 of the Act, relating to the EPA Administrator's power to set air quality criteria for pollutants which "in his judgment" have an adverse effect on public health, "requires proof of demonstrable harm" (Maj. Op. 23-24). This, of course, ignores the fact that Congress *expressly* left this decision in Section 108 to the "judgment" of the EPA Administrator.

Section 202 grants the Administrator authority to prescribe:

> ". . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . .

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* As pointed out in the prior panel opinion 7 ERC at 1360, what the House bill *did* call for were "specific findings" in connection with manner of regulation *if* EPA had first determined that emission products of a fuel additive "will endanger" the public health or welfare or "will impair to a significant degree" the performance of emission control devices. Further, the majority opinion recognizes that its "specific findings" argument is of "doubtful" validity (Maj. Op. 39, n. 38).

** Representative Staggers of the Interstate and Foreign Commerce Committee: ". . . if he has the facts, and he has proven thus by facts, that they are a danger". Representative Rogers (House Manager of the Bill): "whenever the facts show that . . . and additive . . . adversely affects the health or prevents the emission standards from being met". Senator Baker (ranking minority member of the Conference Committee): "when he finds that . . . emissions . . . endanger the public health". (116 Cong. Rec. 19229-30, 19231, 32921)

> which *in his judgment* causes or contributes to, or is likely to cause or contribute to, air pollution which endangers the public health or welfare".

As to the portion of Section 202 dealing with automobile emissions which "in his judgment" cause or contribute or are "likely" to cause air pollution, the majority states that the standard is "more lenient than Section 211" (Maj. Op. 26-27). However, as to the phrase "air pollution *which endangers* the public health or welfare", the majority argues that "regulation may not be premised on a threshold determination of *likely* danger; rather regulation must be premised on a determination of danger." Thus, the majority concludes that: "This is essentially the *same finding* of endangerment as under Section 211"; and that "in making the threshold determination of danger both sections [202 and 211] are the same" (Maj. Op. 26-27).

Thus, the majority agrees that under 211 a "threshold determination" of danger must be made, which cannot be satisfied by a finding of "likely danger."* This *contradicts* its conclusion that the "will endanger" requirement is met by something less than "likely danger" and that even "fear of uncertain or unknown harm" is enough (Maj. Op. 56).

D. Generalized Attribution of Discretion.

The majority seeks to encompass Section 211 in its broad category of questions involving the environment, to justify its claim of wide grant of discretion to EPA:

> "Never before have massive quantities of asbestiform tailings been spewed into the water we drink. Never before have our industrial workers been occupationally exposed to vinyl chloride or to asbestos dust. Never before has the food we eat been permeated with DDT or the pesticides aldrin and dieldrin. And never before have hundreds of

* The dictionary synonyms for "likely" include "in all probability, probably" (Webster's Third New International Dictionary of the English Language 1971); "reasonably to be believed or expected" (The Random House Dictionary, *The English Language*, 1966).

> thousands of tons of lead emissions been disgorged annually into the air we breathe". (Maj. Op. 47.)

In support of this hortatory attempt to measure all environmental matters by a single standard, despite the varied approaches authorized by Congress, the majority cites several other lower court decisions.* The majority suggests that the same standard should be applied in all such cases to "avoid environmental catastrophe" (Maj. Op. 48).

This attempt to blur the specific questions involved in connection with the lead regulation is unjustified. First, all of the cases cited by the majority deal with carcinogens as to which the lower court itself has said that "the concept of a threshold exposure level has no practical significance where carcinogens are concerned."** (*Environmental Defense Fund* v. *EPA (Shell)*, 510 F. 2d 1292, 1298). *The Society of Plastics Industry* and *Hodgson* decisions did not question whether the carcinogen should be regulated, but only the manner of regulation. In both cases, the Secretary of Labor was required by the law to establish safe levels as a maximum for exposure. In *Environmental Defense Fund* v. *EPA*, *supra*, dealing with the pesticides aldrin/dieldrin, the court noted that not only was broad discretion granted on the Administrator, but the statute on its terms "places the burden of establishing the safety of a product on . . . the applicant" (510 F. 2d at 1297).

The *Reserve Mining* decision does not stand for the proposition that regulation in the environmental field can be based on a "non-existent data base." Instead, the Eighth Circuit Court of

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* *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492 (8th Cir. 1975); *The Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F. 2d 1301 (2d Cir.) *cert. denied*, 421 U. S. 992 (1975); *Industrial Union Dept., AFL-CIO* v. *Hodgson*, 449 F. 2d 467 (D. C. Cir. 1974); *Environmental Defense Fund* v. *EPA (Coahoma)*, 465 F. 2d 528 (D. C. Cir. 1972); and *Environmental Defense Fund* v. *EPA (Shell)*, 510 F. 2d 1292 (D. C. Cir. 1975).

** In *Reserve Mining*, the National Academy of Sciences had emphasized that there was no known safe level of the carcinogenic asbestos fibers (514 F. 2d at 508).

Appeals weighed the existing health evidence as to the carcinogenicity of the asbestos tailings in the context of a court of equity determining the need for abatement because:

> "As will be evident from the discussion that follows, we adhere to our preliminary assessment that the evidence is insufficient to support the kind of demonstrable danger to the public health that would justify the immediate closing of Reserve's operations. We now address the basic question of whether the discharges pose *any risk* to public health and, if so, whether the risk is one which is legally cognizable." (514 F. 2d at 507.)

Throughout the majority opinion there runs the strain that the question of the health effects of environmental lead is on "the frontiers of scientific knowledge" and therefore EPA may rely on "guesstimates" and "theoretical extrapolations" and "speculation" (Maj. Op. 46-47). However, lead has been used as an additive in gasoline for over 50 years and its health effects have been studied for as long. The subject of the health effects of lead has received massive attention and has been a continuing source of study for decades.*

The nature of scientific inquiry in the field of environmental health is identical to that in other scientific fields, irrespective of "the problems faced by EPA in deciding whether lead automotive emissions pose a threat . . ." (Maj. Op. 48). As the President of the National Academy of Sciences recently stated in an article referred to by the majority:

> "Government regulation of technical products and processes must rest on a rational and sufficient scientific base. . . . Government regulations or programs intended to combat those hazards must, as a minimum, rest on detailed appraisal of the nature and magnitude of those risks, of the monetary and other costs of measures intended to reduce the severity of each risk, and of the nature and mag-

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* In fact, the number of studies involved in this area is so great that EPA recently published an annotated bibliography on the "Biological Aspects of Lead" which lists over 4,100 studies during the decade prior to 1964. (See Addendum I to Nalco Supp. Br.).

> nitude of the benefits involved in the process or product under consideration." Handler, *A Rebuttal: The Need for a Sufficient Scientific Base for Government Regulation*, 43 Geo. Wash. L. Rev. 808, 812 (1975).

Characterizing this matter as "environmental", as justification for unbridled agency discretion is simply a subtle form of prejudgment of the issues, as reflected in the majority remark that: "For years the lead anti-knock industry has refused to accept the developing evidence that lead emissions contribute significantly to the total human lead body burden" (Maj. Op. 12). But Congress did not intend regulation on the basis of a "non-existent data base". If that were the intent there would have been no need to qualify the EPA Administrator's authority by the "will endanger" language of Section 211(c)(1)(A).

II. The Lower Court Unjustifiably Limited the Scope of Its Review Because This Case Involved Environmental Regulations.

A. The Conflict Within the Lower Court as to Scope of Review.

The five divergent opinions in the lower court raise a substantial issue under the Administrative Procedure Act (5 U. S. C. § 706) as to the thoroughness of the court's review of highly technical environmental regulations.

The majority essentially argues that EPA "should not be bound by either the procedural or the substantive rigor proper for questions of fact" (Maj. Op. 46).

The opinion of Judge Bazelon (joined in by Judge McGowan) while concurring in the construction of Section 211, asserts that "I *cannot agree* that this automatically relieves the Administrator's decision from the 'procedural . . . rigor proper for questions of fact'." (Bazelon Op. 1). On the other hand, Judge Bazelon argues that a lower standard of substantive review must apply ". . . in cases of great technological complexity," and the court should not "scrutinize the technical merits of each deci-

sion" but rather "establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public" (*Id.*).

Judge Leventhal reads the other concurring judges as advocating "engaging in *no substantive review at all*, whenever the substantive issues at stake involve technical matters that the judges involved consider beyond their individual technical competence," and that this is in effect "a signal to judges to abstain from any substantive review" (Leventhal Op. 1).

The dissent asserts that: "From the pages of the Court's opinion there seeps the theme that this is an environmental case; hence the Court like the agency need not labor by the usual rules. *We recognize no such exemption for this or any other type case;* certainly Congress did not give it to us" (Dis. Op. 50).

The concurring dissent, although agreeing with the majority that Section 211(c)(1)(A) of the Clean Air Act embodies "strong precautionary powers," does not agree with its opinion that these powers can be exercised on a "nonexistent data base" (MacKinnon Op. 2-3).

The concept that environmental cases represent a "new era" is not unique. (See *International Harvester Co.* v. *Ruckelshaus*, 478 F. 2d at 615, 650-51 (D. C. Cir. 1973) concurring opinion, C. J. Bazelon.)* However, it has been suggested that the importance and impact of environmental legislation on public health and the economy, calls for *more* supervision by the Court, not less. *Environmental Defense Fund* v. *Ruckelshaus*, 439 F. 2d 584, 597-98 (D. C. Cir. 1971), pointed out that the supervisory power of the court "has come into more frequent use" and that "courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health and liberty . . . To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist

* See also *Environmental Defense Fund* v. *Ruckelshaus*, 439 F. 2d 584, 597 (D. C. Cir. 1971); *Sierra Club* v. *Morton*, 405 U. S. 727, 755 (1972) (Dissent).

on strict judicial scrutiny of administrative action . . ." (Chief Judge Bazelon). See also, *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375, 393 (D. C. Cir. 1973), *cert. denied*, 417 U. S. 921 (1974).

Indeed, the increasing impact of environmental regulations would appear to dictate a continued scrutiny by reviewing courts, to prevent administrative action from becoming, as this Court said in *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167 (1962) "a monster which rules with no practical limits on its discretion."* The need for review, though approached "with utmost diffidence" because of "technical complexities", is apparent (*International Harvester* v. *Ruckelshaus*, 478 F. 2d at 641).**

The need for a resolution of the issue of the scope of review is illustrated by the variety of views expressed by Chief Judge Bazelon who, in *Environmental Defense Fund* v. *Ruckelshaus*, 439 F. 2d at 597-98, called for an increase in the rigor of review of environmental regulations, and in *International Harvester* v. *Ruckelshaus*, 487 F. 2d at 651 suggested that this did not mean the courts would "dig deeper", but now suggests a restriction on substantive review akin to the exclusion of 5 U. S. C. § 701(a)(2) for "agency action . . . committed to agency discretion by law", which as this Court said in *Citizens to Preserve Overton*

* There is no reason to assume that because the subject matter is the environment, that agency personnel will somehow be free of all possibility of "impermissible whim, improper influence, misplaced zeal . . . the clutch of unconscious preference and irrelevant prejudice" *Greater Boston Television Corp.* v. *FCC* (D. C. Cir. 1971), 444 F. 2d 841, 852 (D. C. Cir.), *cert. denied*, 403 U. S. 923 (1971).

** Congress expected that interested parties taking issue with the actions of the Administrator would have the benefit "of an appeal to the court from [under] the Administrative Procedure Act" and if it was felt "that there were not the facts and that the ruling was wrong, the court would have the final decision" (116 Cong. Rec. (Part 14) at 19230-31 House) (10 June 1970). See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), holding that in determining scope of review the court must consider both the Administrative Procedure Act and Congressional intent in adopting the regulatory legislation.

Park v. *Volpe*, 401 U. S. 402, 410 (1971), "is a very narrow exception".

The conflict within the circuit cannot be decided here by a rehearing *en banc* (*U. S. ex rel. Robinson* v. *Johnston*, 316 U. S. 649 (1942)), for a rehearing has already been held. Thus, the purpose of *en banc* hearings, to avoid "conflicts within" and promote "finality of decision" in a court of appeals and to "determine the major doctrinal trends of the future" for the circuit cannot be achieved. *United States* v. *American-Foreign SS. Corp.*, 363 U. S. 685, 689-90 (1960). Unless this Court reviews, there will inevitably be conflicting decisions within the circuit depending upon the composition of the particular panels.* This is particularly important because the Court of Appeals for the District of Columbia is the sole venue for review under several key sections of the Clean Air Act whereby Congress intended to avoid the very problem of conflicting decisions which arises here. Also, because of this circuit's leadership in this area, conflicts within the circuit will no doubt engender conflicts among other circuits, depending upon which of the several views of the lower court are followed.**

Further, review of this issue is necessary because the law of the case may not have been decided below. Assuming that Judges Bazelon and McGowan did not engage in any substantive review, consistent with their opinion—and if their opinion as to the proper scope of review is wrong—then in fact there was no majority and only three of the nine active judges have

* Thus 3 judges assert a reduced rigor of both procedural and substantive review in environmental cases; 2 judges oppose any reduction in procedural rigor but would substantially abdicate all substantive review; and the 4 dissenting judges assert that the same procedural and substantive rigor applies as in other cases.

** While decisions as to the law rendered in one circuit are not binding in other circuits, in the interest of uniformity such decisions should be followed unless the other circuit is convinced that the decision is clearly wrong. *E.g.*, *Homan* v. *United States*, 279 F. 2d 767, 773 (8th Cir.), *cert. denied*, 364 U. S. 866 (1960). In this instance, other circuits would have a variety of choices.

"affirmed" the regulation.* The impact of the lead phasedown regulation on the nation's future and economy is too important, and the controversy over its validity too substantial, to let this regulation stand on such a hybrid vote.

B. The Record Does Not Support the Regulation and Its Promulgation Constitutes a Clear Error of Judgment.

One of the most difficult issues, as reflected in more than a hundred pages of opinion in the court below, is whether EPA here committed a "clear error of judgment" when it determined to regulate lead additives.** In order to justify the regulation, EPA must provide a record for the reviewing court which is of sufficient completeness as to the factors considered and reasons for regulation that the Court can, through a "searching and substantial inquiry", satisfy itself that the decision was "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U. S. at 415. As the court below stated in *Environmental Defense Fund* v. *Environmental Protection Agency,* 465 F. 2d 528, 540-41 (D. C. Cir. 1972):

> "We cannot discharge our role adequately unless we hold EPA to a high standard of articulation . . . The importance and difficulty of subject matter entail special responsibilities when the EPA undertakes to explain and defend its actions in court."

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* It has been held that in case of an *evenly* divided court, an affirmance creates no legal precedent since the "principles of law involved" were not agreed to by a majority of the court, but that the affirmance is "a determination and adjudication of the matter adjudged," as between the parties (*Hertz* v. *Woodman,* 218 U. S. 205, 213-14 (1910)). In this case not only is there no majority as to principles of law, but we believe it may be an open question as to whether there has been an affirmance even as between the parties.

** The majority opinion contains an extensive footnote [Maj. Op. pp. 69-71 fn. 74] which indicates uncertainty as to the meaning of "clear error of judgment" as enunciated by this Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971). The variety of views below as to the scope of review and circumstances which would require the setting aside or remand of the regulation here, is evidence of that uncertainty.

Also in *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 852 (D. C. Cir. 1970), the same court held:

> "The function of the court is to assure that the agency has given reasoned consideration to all of the material facts and issues. This calls for insistence that the agency articulate with a reasonable clarity its reasons for decision, and identify the significance of the crucial facts. . . ."*

If an administrative agency has not complied with the notice provisions of the Administrative Procedure Act (5 U. S. C. § 553) so that the reviewing court has the benefit of comments by interested parties, and the agency's response, the reviewing court does not have the "whole record" which it is required to review under § 706. See *Rodway* v. *U. S. Dept. of Agriculture*, 514 F. 2d 809, 817 (D. C. Cir. 1975); *Portland Cement Association* v. *Ruckelshaus*, 486 F. 2d 375, 400 (D. C. Cir. 1973), *cert. denied*, 417 U. S. 921 (1974); and *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F. 2d at 850 (D. C. Cir. 1970).

This Court has held: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bowman Transportation* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974). The court "must judge the propriety of such [administrative] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by what it considers to be a more adequate or proper basis." *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947).

The following are illustrations of the lack of EPA reasoned decision-making here that require the regulation be set aside as a clear error of judgment or, at the least, that it be remanded to the EPA.

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* See also *EDF* v. *Ruckelshaus*, 439 F. 2d 584, 597 (D. C. Cir. 1971), and *Kennecott Copper Corp.* v. *EPA*, 462 F. 2d 846 (D. C. Cir. 1972).

1. As the dissent points out, to permit its conclusion that there is an over-exposure to lead in the general adult population, EPA rejected several major studies dealing with blood lead levels in adults (some partially sponsored by EPA itself) showing the absence of excessive blood lead in urban adults, on the ground that the studies contained the methodological flaws of no measurement of lead intake from sources other than airborne lead (Dis. Op. 68-74). Yet EPA relied on two older epidemiological studies, which show a small percentage of slightly "excessive" blood lead levels, despite the fact that those studies are subject to the *same alleged imperfect methodology*. There is no articulation of the reasons for this picking and choosing.

The majority sought to supply an explanation for the EPA by asserting that the amount of intake of lead from dietary sources might well be assumed to be *constant* within particular metropolitan areas but assumed to *vary* between different areas (Maj. Op. 85-86).* As the concurring opinion pointed out, this may only be a "homespun scientific aphorism" well beyond the competency of the majority to judge (Bazelon Op. 3).

2. The other basis for the EPA's claim of "significant risk of harm" is the alleged contribution of automobile lead emissions to blood lead levels in urban children through childhood ingestion of lead-laden dirt. The EPA however, admitted that lead in paint is "the primary cause of clinical lead poisoning in children" (38 Fed. Reg. 33736), and its conclusion as to the significance of the contribution of automobile lead emissions is put forward solely as an unproven "hypothesis" (Dis. Op. 79-80). The majority asserts that in any event EPA made this hypothesis only "a secondary basis for the regulations" and therefore placed "only limited reliance on it" (Maj. Op. 90, 95).

* As the dissent argued, not only is this explanation a *post-hoc* rationalization by the court, but it is illogical on its face, since there is no reason to believe that dietary sources of lead would be any more uniform as "between Scarsdale and Harlem", than as between "greater Philadelphia" and "greater New York" (Dis. Op. 77).

In fact, EPA's own scientists, in commenting upon the Third Health Document stated that: "we should like to emphasize that *none* of the studies cited directly implicated lead from automotive exhausts as being responsible for the *harming of any human being*" (App. 1057; Dis. Op. 82).

3. Another clear error of judgment by the EPA is the substantial reliance on the new studies as the basis for the final regulation without adequate notice and opportunity for comment (See *infra* pp. 22-25). This, in and of itself makes the adoption of the regulation "arbitrary, capricious, and an abuse of discretion". *Rodway* v. *United States Dept. of Agriculture, supra,* 514 F. 2d at 817.

III. The Regulation Should Be Set Aside or Remanded to the EPA Because of Failure to Provide Meaningful Opportunity for Comment.

From the outset, one of the principal issues before the lower court involved the lack of meaningful opportunity afforded to interested parties to comment on the scientific studies and "private communications" which formed, in substantial part, the basis for the final regulations (See, Nalco Main Br. 5, 17-18, 22-24 and 31; and Nalco Supp. Br. 44). Now the *en banc* opinions of the lower court have created a related question: whether the reviewing court could properly go outside the administrative record, on an *ex parte* basis after oral argument, and attempt to "reconstruct" the chronology of public notice.

Both issues may have resulted from the rush to regulate which occurred here in part because of the one-page order of the Court of Appeals on October 28, 1973.* But this order could

* As Judge MacKinnon noted in his concurring dissent:

"This complex and lengthy lawsuit was foreordained when, on October 29, 1973, a panel of this court directed the Administrator of the Environmental Protection Agency to reach a final decision within 30 days . . . Although the proposed rulemaking had then been in progress for nearly three years, it was patently

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not alter the need for scrupulous attention to fundamentally fair procedures. The order did not mandate that the EPA jettison its prior medical and scientific bases and rely materially on medical evidence which was never brought to the attention of the public for meaningful comment.

As the Court of Appeals has held on numerous occasions, in complex administrative decision-making, EPA must be held to a high standard of articulation and fairness of procedure in order for the reviewing court to properly function. In *Portland Cement Association* v. *Ruckelshaus, supra,* 468 F. 2d at 393 the court held that:

> "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [to a] critical degree is known only to the agency."

"What counts is the *reality* of an opportunity to submit an effective presentation. . . ." *Walter Holm Co.* v. *Hardin,* 449 F. 2d 1009, 1016 (D. C. Cir. 1971).* The majority did not require the agency to adhere to these principles in this case.

The Third Health Document which was issued by the EPA simultaneous with the final regulations, was described by the EPA as "a presentation of the pertinent evidence upon which a decision *could be made as to whether or not* there is a health justification to regulate lead in gasoline" (App. 30).

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unrealistic to believe that the agency could sift through its accumulated data, afford the public and other agencies an opportunity to review any evidence contributed since the end of the last comment period on March 11, 1973, reach a proper decision based on all the evidence and draft the complicated regulations within the required 30 days." (MacKinnon Op. 1.)

* See also Chief Judge Bazelon concurring in *International Harvester Co.* v *EPA,* 478 F. 2d 615, 651 (D. C. Cir. 1973); *Hess & Clark* v. *FDA,* 495 F. 2d 975, 990 n. 45 (D. C. Cir. 1974); *Environmental Defense Fund* v. *EPA,* 465 F. 2d 528, ... (D. C. Cir. 1972), and *Kennecott Copper Corp.* v. *EPA,* 462 F. 2d 846, 850 (D. C. Cir. 1972). Other circuit courts of appeals agree: *South Terminal Corp.* v. *EPA,* 504 F. 2d 646, 665 (1st Cir. 1974); *Great Lakes Screw Corp.* v. *NLRB,* 409 F. 2d 375, 379 (7th Cir. 1969); and *Austin* v. *Jackson,* 353 F. 2d 910, 911 (4th Cir. 1965).

The "evidence" on which the EPA Administrator *actually relied* in support of the final decision to regulate, was discussed in the extensive Preamble to the regulations (App. 5; Dis. Op. A-1 to A-14). The Preamble made no attempt to defend the earlier studies relied on in prior Health Documents, but instead "weighed against these criticisms, [new] studies which have shown that airborne lead does contribute significantly to lead exposure in the general population" (App. 3).

As the basis for the final regulations, the EPA Administrator discusses six studies relating to airborne lead as an endangerment to health of adults* and in the Preamble the EPA discusses these six studies—*and only these six studies* (App. 3-4). Thus, these studies form the principal, if not complete, EPA basis for the regulations.

For the second aspect of its health justification (lead in dirt contributing to childhood lead poisoning), EPA again relies almost entirely on new studies and "private communications": two Newark studies; and studies from Chicago, Philadelphia and Rochester.** As the dissent points out, these studies were not only referred to in the "New Information" section of the Preamble, but were also fully discussed in the EPA Administrator's summary of information upon which he relied (Dis. Op. 30). The majority opinion's argument that these studies "play *no role* in the Administrator's decision to regulate" (Maj. Op. 107) is incredible: The majority opinion itself, which discusses the "evidence tying children to leaded dust", discusses only five studies, three of which are the new studies referred to above (Maj. Op. B-1 *et seq.*).***

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* Two pilot lead isotope studies (App. 678 and 704) "an unpublished study in Japan" (App. 1092); Chamber studies (App. 596 and 391); the Seven Cities Study re-analysis (Doc. 228); and the Daines Study (App. 466).

** See, App. 5, 138, 140, 662, 718, 738 and 967.

*** That these studies are crucial to the EPA's dustfall "hypothesis" is further evidence by EPA's statement in the Third Health Document that:

> "Studies from Philadelphia, Chicago and Newark discussed above provide persuasive evidence to strongly suggest that

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Thus, these studies are not simply makeweight for the EPA but serve as a fundamental basis for the second part of the EPA's health justification basis for the regulations.

EPA admitted that the reproposal of the regulations on January 10, 1973 occurred not only because the EPA's basis for the reduction was "substantially revised," but because its basis "had not been available for review by the scientific community" (App. 29). Yet, in November, 1973, the EPA was willing to propose final regulations when the new basis for those regulations had not been available for scientific scrutiny. The opinions discuss, in detail, when these new studies may have become available for comment (Maj. Op. pp. 101 to 106; Dis. Op. pp. 27 to 29). Several of these studies may have become "available" for the first time at the Conference on Low Lead Toxicity on October 1-2, 1973 in the month prior to the promulgation of the final regulations (Maj. Op. 101; Dis. Op. 25). However, even in November, 1973 when the EPA's Third Health Document was completed, EPA admitted that: "A detailed evaluation of all presentations at the conference is beyond the scope of the [Third Health] document" (App. 31). Other new material relied on had not even been published at the time the regulations were promulgated and were either in draft form, "in press" or simply unavailable "private communications".*

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sources of lead other than paint, including that resulting from the presence of lead in gasoline, play an important role in childhood lead exposure." (App. 130.)

* The "unpublished Japanese study", second Newark study, the so-called "Chicago Study" which was a "personal communication from Coordinator of the Chicago Lead Poisoning Program to Dr. J. S. Lin-Fu" (App. 140) and "personal communication from Philadelphia Dept. of Public Health" (App. 138).

The majority opinion argued that petitioner Nalco was able to comment upon some of the newly disclosed bases for the regulations as evidenced by petitioner's "extensive comments" on these new studies (Maj. Op. 102, n. 106). These "extensive" comments on an EPA tentative draft consisted of all of three pages in a 54 page document (Doc. 821, pp. 7-9). Further, these comments could not

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To discern the dates on which some of these drafts and new studies became "available" the lower court relied upon a series of unsupported and unsworn assertions made by EPA counsel in letters sent to the Court of Appeals *after* the *en banc* argument. The majority mistakenly assumed that counsel for petitioner was kept informed of these *ex parte* communications, and that the "facts" asserted in these letters were not disputed and therefore usable by the court.* That assumption is incorrect:

(a) Counsel for petitioner did not receive the letter of September 26, 1975 (see Appendix B., B2-4, hereto), until the next week, when it was sent to counsel because counsel for petitioner had learned that such a letter had been sent and specifically requested a copy.

(b) Counsel for petitioner learned of the October 2, 1975 letter *for the first time* upon reading the *en banc* opinions of the court below. This letter was never sent to petitioner's counsel as shown by the face of the letter which does not bear any certificate of service or carbon copies to petitioner's counsel (see Appendix B., B8, hereto).

(c) It has also now been learned that a third letter was sent to the Court of Appeals dated September 22, 1975. This letter was also not sent to counsel for petitioner (Appendix B., B1, hereto).

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have been received, if mailed to the EPA, more than one week prior to final announcement of the regulations and EPA's 117 page supporting document. The fact that one interested party may have appreciated that the EPA planned to rely substantially on new, uncommented upon material, is not relevant to the issue of the lack of opportunity for meaningful public comment to governmental agencies concerned, with the protection of the public health. See: *Walter Holm & Co.* v. *Hardin*, 449 F. 2d 1009, 1016 (D. C. Cir. 1971); *Wagner Electric Corp.* v. *Volpe*, 466 F. 2d 1013, 1019 (3d Cir. 1972); *Hotch* v. *United States*, 212 F. 2d 280, 282 (9th Cir. 1954).

* "Copies of these letters were sent by EPA to counsel for all parties to this litigation. No party commented on either letter." (Maj. Op. 101, n. 104.)

(d) When counsel for petitioner requested information as to documents which had been sent to the lower court, counsel for EPA sent a letter dated October 15, 1975 (Appendix B., B9-11, hereto) which did not disclose the existence of the October 2, 1975 letter but merely enclosed a copy of a partial list of documents sent to the lower court.

Thus, the fact that a complaint was not made by "able and experienced counsel for petitioners" (Maj. Op. 101), is hardly relevant, since it was impossible for counsel to complain about a situation about which it was uninformed.

Even this attempt to supplement the record failed to "disclose when each piece of new information is received and when and how it was made available for comment" (Bazelon Op. 5).

For example, the September 26, 1975 letter from EPA counsel to the lower court said as to the *first* isotope study (Doc. 113) that "the files of the Office of General Counsel . . . indicate that the abstracts were sent . . . to the public file on October 4, 1973" (Appendix B., B3, hereto). EPA counsel apparently did not know when they were actually placed in the files to be theoretically "available" to whomever might be canvassing through the "public file". This letter also states that the *second* isotope study was "sent to the Office of the General Counsel on August 6, 1973 for transmittal to . . . the public file." The letter further asserts, without record support, that the Japanese study "was sent to the Office of General Counsel on July 22, 1973 for transmittal . . . to the public file". As to each assertion there is no indication when the documents were *actually* transmitted to and placed in the "public file".

The letter of EPA counsel to the clerk of the lower court dated September 22, 1973 refers to a court inquiry as to "docket records", possibly questioning whether there are any records of the actual date of deposit of materials in the public information file (Appendix B., B1, hereto). Counsel for petitioner is still not privy to these communications.

Finally, the October 2, 1975 letter, enclosing a report on "preliminary results of the first isotope study" says, "The letter was filed and indexed with the public comments under 'California University' and I overlooked it before" (Appendix B., B8, hereto). With such a filing system, confusing to EPA's own counsel, how can it appropriately be suggested that petitioner was "on notice" of everything which might be deposited, at some time or other, in the EPA public information files?*

Two of the concurring judges (Judges Bazelon and McGowan) noted, "the failure of the record to clearly disclose the procedural steps followed by EPA," stating that the Court was forced to "reconstruct these steps by inferences and surmise." Thus the concurring judges concluded that: "Ordinarily, . . . I think a record which so burdens judicial review would require remand for clarification", but in this case the court chose not to do so (Bazelon Op. 4-5).

The action of the reviewing court here goes well beyond the power of an appellate court and is in direct conflict with decisions of this Court. If the record is insufficient or even unclear on such a crucial issue as the opportunity to comment, the action must be remanded to provide such an opportunity. In *Camp* v. *Pitts*, 411 U. S. 138 (1973) (*per curiam*), this Court dealt with a similar question where the case presented a "narrow, but substantial, question with respect to the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for judicial review." (411 U. S. at 138.) The Court held that in applying the "arbitrary and capricious" test:

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* In the EPA counsel's letter of October 15, 1975, responding to petitioner's counsel's telephone inquiry, EPA counsel did not "make note of all the documents requested shortly after oral argument", but attached a list showing "The type of document is indicated and the list is otherwise complete", and that "several letters from industry" were requested, presumably by the Court, but "specific document numbers were not noted" (Appendix B., B9-11, hereto).

> ". . . the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (411 U. S. at 142.)

Here, the lower court did make a new record as to when documents were perhaps made available for public comment and petitioner was severely prejudiced by this *ex parte* action.

In summary, consideration of procedural issues under 5 U. S. C. § 553 of the Administrative Procedure Act raises the following issues:

(a) Does the melange of alleged notices through presentation of material during "by invitation only" seminars, transmission to one interested party, or deposit in "public files" at some undetermined dates at intermittent times during the months immediately preceding issuance of the regulations, comply with the statute's requirement for notice and opportunity to comment?

(b) Is it a reasonable construction of Section 553 to hold that interested members of the public must make in effect a daily check of the deposit of materials in inadequately indexed "public files" of the agency, guess as to which materials the agency will seek to rely on, and file their comments sufficiently in advance of rule-making to assure that the agency has had an opportunity to consider them, all at the peril of being held to have waived right of comment on new materials substantially relied on by the agency if they do not do so?

(c) Does the fact that the EPA previously published notices of proposed regulations and material on which it proposed to rely and provided a period for comment thereon, excuse the failure to follow such procedure when the final regulation is based substantially on new scientific and medical materials as to which there has been no notice and opportunity to comment?

(d) Can the reviewing court properly rely upon *ex parte* unsworn and unsupported assertions of agency counsel to add to the administrative record on review on an important issue such as notice and the opportunity to comment?

CONCLUSION.

The questions presented raise issues of national importance, which have generated widely divergent opinions in the lower court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

1. *Clean Air Amendments of 1970*, Pub. L. 91-604, Dec. 31, 1970, 84 Stat. 1698-1700.

42 U. S. C. § 1857c-3(a)(1).

Sec. 108.(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

42 U. S. C. § 1857f-1(a)(1).

Sec. 202. (a) Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to, or is likely to cause or to contribute to, air pollution which endangers the public health or welfare. Such standards

shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d)), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

42 U. S. C. § 1857f-6c(c).

Sec. 211. (c)(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products or such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 202.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels,

or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish his findings with respect to any matter he is required to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

42 U. S. C. § 1857h-5.

Sec. 307. (b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia.

2. *Administrative Procedure Act*

5 U. S. C. § 553(b)

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

5 U. S. C. § 706(1) & (2)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. *The Fuel Additive Regulation*

FED. REG. VOL. *38*, NO. *234*, *Dec. 6, 1973*

Part 80 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. In § 80.1, the second sentence is revised to read as follows:

§ 80.1 Scope.

* * * These regulations are based upon a determination by the Administrator that the emission product of a fuel or additive will endanger the public health, or will impair to a significant degree the performance of a motor vehicle emission control device in general use or which the Administrator finds has been

developed to a point where in a reasonable time it would be in general use were such regulations promulgated; and certain other findings specified by the Act.

2. In § 80.2, a new paragraph (m) is added as follows:

§ 80.2 Definitions.

* * * * *

(m) "Lead additive manufacturer" means any person who produces a lead additive or sells a lead additive under his own name.

3. A new § 80.20 is added as follows:

§ 80.20 Controls applicable to gasoline refiners.

(a)(1) In the manufacture of gasoline at any refinery, no gasoline refiner shall exceed the average lead content per gallon specified below for each 3-month period (January through March, April through June, July through September, October through December):

(i) 1.7 grams of lead per gallon, after January 1, 1975;

(ii) 1.4 grams of lead per gallon, after January 1, 1976;

(iii) 1.0 grams of lead per gallon, after January 1, 1977;

(iv) 0.8 grams of lead per gallon, after January 1, 1978;

(v) 0.5 grams of lead per gallon, after January 1, 1979.

(2) For each 3-month period (January through March, April through June, July through September, October through December) the average lead content per gallon shall be computed by dividing total grams of lead used at a refinery in the manufacture of gasoline by total gallons of gasoline manufactured at such refinery.

(3) For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each refiner shall submit to the Administrator a report showing for each refinery (i) the total grams of lead in lead additive inventory on the first day of the

period, (ii) the total grams of lead received during the period, (iii) the total grams of lead in lead additive inventory on the last day of the period, (iv) the total gallons of gasoline produced by such refinery during the period, and (v) the average lead content in each gallon of gasoline produced during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

(b) The provisions of paragraph (a) (1)(i) and (ii) of this section shall not be applicable to any refiner which does not have more than 30,000 barrels per day crude oil or bona fide feed stock capacity from owned or leased facilities or from facilities made available to such refiner under an arrangement such as, but not limited to, an exchange agreement (except one on a refined product for refined product basis), or throughput or other form of processing agreement, with the same effects as though such facilities had been leased.

4. A new § 80.25 is added as follows:

§ 80.25 Controls applicable to lead additive manufacturers.

For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each lead additive manufacturer shall submit to the Administrator a report showing the total grams of lead shipped to each refinery by such lead additive manufacturer during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

5. A new § 80.26 is added as follows:

§ 80.26 Confidentiality of information.

Information obtained by the Administrator or his representative pursuant to this part shall be treated, in so far as its confidentiality is concerned, in accordance with the provisions of 40 CFR Part 2.

APPENDIX B.

ENVIRONMENTAL PROTECTION AGENCY.

September 22, 1975

Ms. Terry Jalbert
Office of the Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
U. S. Courthouse
Third Street and Constitution Avenue
Washington, D. C.

Dear Ms. Jalbert:

Enclosed in two folders are the documents from the record in *Ethyl Corporation* v. *EPA* requested by the Court this morning.

Will you ask Mr. Cathay to call me at his convenience tomorrow? I do not think EPA maintained in the past the type of docket records mentioned in his request to Mr. Clark of the Justice Department, but I would like to clarify the request. My telephone number is 755-0766.

Also, Mr. Shawaker, the Justice Department attorney assigned to this matter will be out of the country for the next three weeks. If additional documents are needed, I suggest that your office contact me directly during this period. The record is stored in my office, and we will be able to respond promptly.

Sincerely yours,

Leslie Carothers,
Attorney
Air Quality Noise and
Radiation Division (A-133)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D. C. 20460

September 26, 1975

Mr. Dan Cathey
Office of the Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
U. S. Courthouse
Third Street and Constitution Avenue
Washington, D. C.

Re: *Ethyl Corporation* v. *EPA* (73-2205)

Dear Mr. Cathey:

This is in reply to your request for information on the dates when EPA received Documents 113 and 468 in the record of the rulemaking regarding lead additives in gasoline. The information you requested is as follows:

A. *Document No. 113*

This document in the record consists of two separate studies by Rabinowitz, Wetherill, and Kopple using lead isotope tracers to investigate human lead metabolism.

1. The first study listed in the Certified Index to the Record and entitled "Studies of human lead metabolism using stable isotope tracers" was presented at a joint EPA-HEW Symposium on lead on October 1-2, 1973. There is no evidence in the record or elsewhere that EPA received an advance copy of the full text of this paper.

EPA did receive advance abstracts of most of the papers presented shortly before the Symposium. These abstracts, including an abstract of the Rabinowitz paper, appear in the record

as Document No. 1092. The files of the Office of General Counsel, which reviewed many documents before transmittal to Ethyl Corporation under a Freedom of Information Act Agreement, indicate that the abstracts were sent to Ethyl Corporation and to the public file on October 4, 1973.

2. The second study by the same authors indexed as Document 113 is "Lead Metabolism in the Normal Human: Stable Isotope Studies." The copy of the study appearing in Document 113 is the study as published in the November, 1973 issue of *Science* Magazine.

The isotope study reported in *Science* was conducted before the similar study reported at the EPA/HEW symposium. An early draft of the study ultimately published in November, 1973, was sent to EPA by one of the authors on May 5, 1973. The covering letter and the attached draft appear in the record as Document No. 470. A copy of that document is enclosed.

In addition, a revised and final draft of the same study was subsequently received by EPA and sent to the Office of General Counsel on August 6, 1973 for transmittal to Ethyl Corporation and the public file. This typed draft does *not* appear in the Certified Index to the Record, because I directed the librarian who assisted me in preparing the index to remove drafts of scientific articles that were also available in published form by the time the regulations were promulgated, provided that the typed draft was identical to the published version. I retained in my files of duplicates the copy of the typewritten draft with the notation that it was withdrawn from the public file on January 22, 1974, during the period when we prepared the index. I will be glad to forward this draft and the notation if the Court desires it.

B. *Document No. 468*

The study by Tsuchiya, et el. entitled "Study of Lead Concentrations in Atmosphere and Population in Japan" was sent to the Office of General Counsel on July 22, 1973, for trans-

mittal to Ethyl Corporation and to the public file. The document was therefore received by EPA before that date.

If I can be of further assistance, please let me know.

Sincerely yours,

/s/ LESLIE CAROTHERS
Leslie Carothers
Attorney
Air Quality Noise and
Radiation Division (A-133)

Enclosure.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Washington, D. C. 20460.

September 29, 1975

David Mechanic, Esq.
Pierson, Bell & Dowd
1000 Ring Building
Washington, D. C. 20036

Dear Mr. Mechanic:

Re: Ethyl Corporation v. EPA (73-2205) and related cases

Last week, the Clerk of the Court requested information on the dates when EPA received Documents No. 113 and 468 in the Certified Index to the Record. Our letter in response to this request is enclosed for your information.

Sincerely yours,

/s/ LESLIE CAROTHERS
Leslie Carothers
Attorney
Air Quality Noise and
Radiation Division (A-133)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Washington, D. C. 20460.

October 1, 1974

Mr. Robert Bonner
Chief Deputy Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
U. S. Courthouse
Washington, D. C.

Re: Ethyl Corp. v. EPA, 73-2205; Nalco Chemical Co. v. EPA, 73-2270; NPRA v. EPA, 74-1021; PPG Industries v. EPA, 73-2268; E. I. DuPont De Nemours v. EPA, 73-2269.

Dear Mr. Bonner:

Per your request, I am enclosing eight (8) copies of the article entitled "Atmospheric Lead: Its Relationship to Traffic Volume and Proximity to Highways" by Robert H. Daines, Harry Motto, and Daniel M. Chilko. The article was published in the April, 1970 issue of *Environmental Science and Technology*. This study is cited in other articles reproduced in the Joint Appendix (see, e.g., p. 269 n. 17 and 467 n. 1), but a copy of this reference was not included in the Certified Index to the Record.

I am also enclosing copies of a second article with a similar title by the same authors in case there was any confusion about the reference desired. That article is entitled "Lead in Soils and Plants: Its Relationship to Traffic Volume and Proximity to Highways" by Harry L. Motto, Daniel H. Daines, Daniel M. Chilko, and Carlotta K. Motto. This reference is Document No. 102 in the Certified Index to the Record, but it is not included in the Joint Appendix.

A complete copy of *Airborne Lead in Perspective*, the Report of the National Academy of Sciences is also included as you requested. It is Document No. 14 in the Certified Index. Excerpts from the report are reproduced in the Joint Appendix at pp. 309-363.

Copies of this letter and the two enclosed articles are being sent to counsel of record. If I can be of further assistance, please let me know.

Sincerely yours,

/s/ LESLIE CAROTHERS
Leslie Carothers
Attorney
Air Quality Noise and
Radiation Divison (EG-333)

EG-333

cc: Edward J. Shawaker, Esq.
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H. Edward Dunkelberger, Esq.
Theodore L. Garrett, Esq.
Covington & Burling
888 16th Street, N.W.
Washington, D. C. 20006

October 2, 1975

Mr. Dan Cathey
Office of the Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
U. S. Courthouse
Third Street and Constitution Avenue
Washington, D. C.

Re: Ethyl Corporation v. EPA (73-2205) and related cases

Dear Mr. Cathey:

Enclosed is a copy of Document No. 875, a letter to EPA dated August 28, 1972, reporting preliminary results of the first isotope study in Document No. 113. The letter was filed and indexed with the public comments, under "California University" and I overlooked it before.

I am also enclosing a copy of the letter sent to opposing counsel with the copy of my letter to you of September 26, 1975. Identical letters were sent to each counsel.

Sincerely yours,

/s/ LESLIE CAROTHERS
Leslie Carothers
Attorney
Air Quality Noise and
Radiation Division (A-133)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Washington, D. C. 20460.

October 15, 1975

Victor P. Kayser, Esq.
Chadwell, Kayser, Ruggles,
McGee & Hastings
135 South LaSalle Street
Chicago, Illinois 60603

Re: Nalco Chemical Company v. EPA (73-2270)

Dear Mr. Kayser:

Mr. Fitz told me that you were interested in knowing what documents the Court had requested from the record of the lead litigation. I am enclosing a copy of our list of the documents requested to date. As the enclosure indicates, I did not make note of all the documents requested shortly after the oral argument; but the type of document is indicated, and the list is otherwise complete.

Sincerely yours,

/s/ LESLIE CAROTHERS
Leslie Carothers
Attorney
Air Quality Noise and
Radiation Division (A-133)

cc: Mr. William Fitz

DOCUMENTS FROM THE ETHYL RECORD REQUESTED BY THE COURT.

9/22/75

160 Summary of Comments Relative to EPA Position on Lead in Gasoline. Undated.

170 Summary Relative to EPA Position on Lead. Undated.

180 EPA Reopens Record on Proposed Lead Regulations. Undated.

345 Summary of EPA's Position for Controlling Lead in Leaded Gasoline. Undated.

835 International Lead Zinc Research Organization, Inc. Letter from J. F. Cole, July 30, 1973.

836 Letter from J. F. Cole, March 9, 1973.

9/3/75

84 Knelson, Role of Clinical Research, etc. (also in Appendix).

85 Knelson, Kinetics of Respiratory Lead Intake in Humans, May 1973. (Also in Appendix).

111 Proceedings of Luxemburg Conference.

141 EPA's Position on the Health Effects of Lead. (Draft of Health Paper), October 19, 1973.

142 EPA's Position on the Health Effects of Lead. (Draft of Health Paper), July 25, 1973.

143 EPA's Position on the Health Effects of Lead. (Draft of Health Paper), June 22, 1973.

433 Ethyl Transcript of EPA/HEW Symposium, Oct. 1-3, 1973.

486 Briefing memo for Train, October 1973.

1109 Unsigned, untitled draft of Briefing paper, July 12, 1973.

6/9/75

807 DuPont Submission, 3/9/73.

821 Nalco (Calandra) critique of EPA Health Position Paper, November 19, 1973.

Several letters from industry received just before the Court-ordered decision date were requested. Specific document numbers were not noted.